Filed 10/13/16 Villicana v. Lindsay CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ULISES VILLICANA, Plaintiff and Appellant, v. CECILE LINDSAY, Defendant and Respondent.	G052709 (Super. Ct. No. 30-2012-00606178) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

The Chang Firm and Randy Chang for Plaintiff and Appellant.

Baker Law Group and John H. Baker for Defendant and Respondent.

This is an appeal from a judgment awarding attorney fees and costs in a partition proceeding. Ulises Villicana contends the award is improper because it included fees/costs incurred after the partition "cause of action" concluded. He also maintains the trial court erroneously determined Villicana waived his right to the allocation of his attorney fees and costs by failing to file a separate motion. We find these contentions lack merit, and we affirm the judgment.

I

Villicana and Cecile Lindsay were in a long-term romantic relationship that lasted over 20 years. Although they did not marry, they jointly purchased two houses and a vacant lot in Baja, California.

In 1997, the couple purchased a home located on Lowell Circle in Westminster, California (the Lowell Property). They initially held the home as joint tenants, but a few days later, they recorded a new deed stating they were tenants in common. They refinanced the Lowell Property in 2002, 2005, and 2010.

Villicana and Lindsay took out a home equity line of credit (HELOC) on the Lowell Property to make the down payment on a second home on Duncannon Avenue in Westminster, California (the Duncannon Property). Villicana and Lindsay resided in the Lowell Property, and Villicana's family lived in the Duncannon Property.

When the relationship ended in 2010, they had difficulty agreeing on division of the properties and disputed who owed the other money. In 2012 Lindsay filed a partition action regarding the Duncannon Property (*Lindsay v. Villicana* case No. 30-2012-00553372 (the Duncannon Action). The house was sold and proceeds distributed.

In October 2012, Villicana filed a "complaint for partition and damages." The complaint alleged he and Lindsay co-owned the Lowell Property and it was encumbered by two deeds of trust owned by Wells Fargo Bank. The first claim sought "[p]artition by sale of the property" because this result was more equitable and practical

than a physical "division in kind." The second claim was for quiet title of the Lowell Property, declaring Villicana owner in fee simple. And the third claim was for declaratory relief, seeking a judicial determination of Villicana's rights to the property and damages "resulting from payment of loans, taxes, improvements, etc. on the subject real property in the sum of $100,000, or more." In addition, Villicana sought attorney fees, costs of suit, and any other relief the court deemed "just and proper."

After a year, Lindsay grew frustrated with Villicana's failure to move forward with his partition action and she filed a motion for an interlocutory judgment and to appoint a referee to carry out the sale. She argued, "The parties have discussed settlement for months now but have not reached an agreement. In order to take advantage of the currently hot market and prime summer selling period, [Lindsay] now makes a motion [for the court to order partition of the property] and appoint a referee." Lindsay submitted proof she and Villicana each owned 50 percent of the property and it was encumbered by two trust deeds in favor of Wells Fargo Bank.

The trial court denied the motion due to a number of procedural defects. In its minute order, the court stated that ordinarily the partition action's plaintiff must record a lis pendens but Villicana failed to file one, and therefore, the action should be stayed until the notice is recorded. The court stated Lindsay, as the defendant, could seek a partition by sale but she failed to make the necessary allegations in her answer to Villicana's complaint. It concluded Lindsay's motion was not the proper vehicle to obtain an interlocutory judgment because the statutory scheme "setting forth the court's powers in partition actions specifically contemplate[s] a trial." Lindsay's motion did not provide adequate proof regarding the existence or status of the first and second deeds and the amounts owed. It commented a title report would have been helpful. The court concluded it was not "comfortable" dividing the property, without more evidence, to adequately protect the interests of "lienholders of record who [were] not before the court and who have no notice" of the hearing.

Before trial, Villicana submitted a brief stating the Lowell Property had been sold and the proceeds disbursed. He stated, "The remaining issues for the court trial are as follow[s]:

"a. Whether [Villicana] is entitled to all or a portion of the $49,695.45, the money they refinanced from the Lowell [Property] to purchase [Lindsay's] step-father['s] home, but [he] changed his mind and return[ed] all the [money to Lindsay] and [she] kept the money in her own bank account which [Villicana] had no access.

"b. Whether [Villicana] is entitled to access rents and storage fees by reason of [Lindsay] kicking [him] out of the Lowell [Property].

"c. Whether [Villicana] is entitled to damages, including lost personal items, by reason of [Lindsay] asserting exclusive ownership of the Lowell [Property]."

Lindsay filed a trial brief stating she believed there were no more issues to be resolved in the partition lawsuit because the property was sold and the net proceeds distributed. She explained, "[Villicana] balked at signing a stipulation for judgment so that this case could be terminated. He insisted on a trial on the issues of how the proceeds from the parties' loan . . . were used and how attorney fees should be apportioned under [Code of Civil Procedure] section 874.040 . . . . In open court, [Villicana] said he would waive his main claim regarding the loan proceeds if [she] would give him a global release of all claims, including [her] claim regarding the Baja property, which is unrelated to the partition lawsuit. [Lindsay] refused at the time to give [him] a global release."

Lindsay argued Villicana's claims on the remaining partition issues lacked merit. He was not owed rent after he voluntarily moved out of the house, and she was not required to reimburse for lost clothing. In addition, Lindsay stated she had evidence to show the $49,695 in loan money was spent on a kitchen remodel ($32,000) and other home improvements such as carpeting ($12,000). From the loan proceeds, she also

admitted loaning $7,000 to "a mutual friend in Baja California who was in dire economic straits."

After considering argument and testimony from several witnesses, the trial court ruled Lindsay owed $3,308.66 to Villicana. It concluded the $43,078 spent for home improvements was appropriate, however, Lindsay did not establish a valid set off for $6,617.33. Villicana was entitled to recover half of that amount ($3,308.66). The court determined Villicana should not be allocated any portion of the $7,000 loan made to the couple's friends. The court ruled Villicana also was not entitled to recover for lost rent, storage costs, or for lost property. It added, "If parties request costs or attorney fees, parties are to meet and confer and the motions must be made within 14 days."

Lindsay filed a motion for attorney fees and costs. She provided proof of $47,735 in attorney fees "largely due to the lack of cooperation by [Villicana]" and $4,023.85 in costs. She calculated Villicana's half was $25,879.43. She noted that in the Duncannon Action, the court entered a $18,000 judgment against Villicana. Lindsay recalled that in the Duncannon Action, the court noted in its tentative ruling, "which was read into the record," that the fees/costs were higher "'than if [Villicana] had been cooperative.'"

Lindsay stated she was represented by the same attorney in both lawsuits. Villicana was represented by one attorney when he filed the action in mid-October 2012, until mid-June 2014. He was in propria persona until he hired a different attorney nearly one year later in May 2015. Lindsay argued she had been "frustrated at every turn" by Villicana and his "delaying and hold-up tactics." She argued the partition lawsuit should have been quick and straightforward.

Villicana filed an opposition stating Lindsay did not incur her fees/costs for "the common benefit" and, therefore, they are not recoverable as part of the petition cause of action. He asserted the trial was necessary because of a dispute regarding "the Baja property and nothing more; hardly a legitimate argument of common benefit." He

asked the court to not treat attorney fees and costs as a mere arithmetic problem, but rather, to exercise its discretion and award only fees/costs incurred for the common benefit. Alternatively, he argued the amount of attorney fees requested was unreasonably high.

On the last page of his opposition, Villicana included the following subheading: "[Villicana] incurred attorney[] fees of $19,031[] from May 15, 2015 to present and cost[s] of $1,190.40 totaling $20,221.40." (Capitalization omitted.) Below this heading were the following two sentences. "Conversely, it is due to [Lindsay's] imposition of the Baja real property which was the sole cause of [Villicana] to retained [*sic*] The Chang Firm, [Lindsay] should bear 100 [percent] costs incurred by [Villicana] from May 2015 to the conclusion of the case while take nothing [*sic*] from [Villicana]. See Declaration of Randy Chang and Exhibit B." Exhibit B contained copies of Villicana's counsel's billing sheets.

Lindsay filed a reply, stating her reasonable attorney fees must be divided equally between the parties. She added Villicana was not entitled to have his own fees/costs considered because he did not file a motion. She objected to Exhibit B.

The court granted Lindsay's motion, concluding the legal fees were for the common benefit of the co-owners. It noted only Lindsay filed a motion for attorney fees "within the time requirement set forth in the [j]udgment on this case" and therefore, Villicana waived his right to seek apportionment of his fees/costs. The court ordered Villicana to pay $25,081.42, which reflected his half of approved attorney fees and costs. It noted fees/costs relating to the Baja property were not considered in the final award, and the court struck $1,500 for court reporter costs (Lindsay conceded this cost was improper). In the final judgment, the court stated the total amount to be awarded would be offset by the amount Lindsay owed Villicana ($3,308.66). Consequently, it entered judgment in favor of Lindsay and against Villicana for $21,772.76.

II

Villicana's first contention on appeal is that the partition action concluded in July 2014 when the property was sold, escrow closed, and the proceeds were distributed. He concedes a trial court is generally authorized to apportion fees/costs in an accounting incidental to the partition claim. (Code Civ. Proc., § 874.010.)[1] However, Villicana asserts the trial in this case concerned damages unrelated to the partition claim. He argues adjudication of his declaratory relief claim was a collateral matter that did not benefit the common interests of the co-owners. He maintains the trial court lacked authority to award attorney fees and costs incurred to litigate damages that were not for the common benefit of the parties. We conclude the court did not abuse its discretion in determining that resolution of the declaratory relief matters were for the common benefit of the parties, and therefore, attorney fees and costs were appropriate.

We find instructive case law discussing the special nature of partition, which, as a statutorily authorized equitable action, confers on the trial court broad discretion to fashion relief without being bound by strict rules of procedure. (*Richmond v. Dofflemyer* (1980) 105 Cal.App.3d 745, 766.) "An action for partition is governed by the broad principles of equity jurisprudence, and 'the courts have adhered, in adjusting the rights of cotenants and defining their interests in the common property, to the classic formulas encapsulated in the maxims that equity is equality and he who seeks equity must do equity, and have dispensed equitable relief only upon condition that the equitable rights of a cotenant are respected and safeguarded.' [Citation.]" (*Wallace v. Daley* (1990) 220 Cal.App.3d 1028, 1035.)

Under the statutory scheme regarding petition actions "the court may hear and determine all motions, reports, and accounts and may make any decrees or orders necessary or incidental to carrying out the purposes of this title and to effectuating its

[1] All further statutory references are to the Code of Civil Procedure.

decrees and orders." (§ 872.120.) "The interests of the parties, plaintiff as well as defendant, may be put in issue, tried, and determined in the action." (§ 872.610.) Once the court finds a litigant is entitled to partition, "it shall make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property and, unless it is to be later determined, the manner of partition." (§ 872.720.) In addition, "The court may, in all cases, order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of equity." (§ 872.140.)

"The statutory authority which allows attorney[] fees in partition actions is . . . section 874.010. This section states, 'The costs of partition include: (a) Reasonable attorney[] fees incurred or paid by a party for the common benefit.' This section, read in conjunction with . . . section 874.040 which states: 'Except as otherwise provided in this article, the court shall apportion the costs of partition among the parties in proportion to their interests or make such other apportionment as may be equitable,' leads to the conclusion that costs should be awarded in proportion to the litigant's interest in the property. The purpose of the statute is . . . 'to divide the cost of legal services among the parties benefited by the result of the proceeding.'" (*Stutz v. Davis* (1981) 122 Cal.App.3d 1, 4.)

The parties dispute the applicable standard of review for an attorney fee award in a partition action. Villicana maintains we review the award de novo, but also acknowledges that the question of whether attorney services are for the common benefit "must be decided upon the facts and circumstances in each particular case." (*Stewart v. Abernathy* (1944) 62 Cal.App.2d 429, 433.) The trial judge, who presided at the court trial, is in the best position to know if the legal services were connected to the partition action or not. Consequently, it is well settled, "The standard of review on issues of attorney[] fees and costs is abuse of discretion. The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or

when there has been a miscarriage of justice. If the trial court has made no findings, the reviewing court will infer all findings necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence." (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545, fns. omitted [reviewing attorney fee award in partition action].)

As discussed by both parties in their briefing, a trial court is authorized to apportion attorney fees incurred in an accounting incidental to the partition lawsuit. (*Regalado v. Regalado* (1961) 198 Cal.App.2d 549, 551 (*Regalado*).)[2] In the *Regalado* case, the appellate court held that where the action's primary goal is to partition property, and it seeks an accounting as an incidental feature of that action, fees are allowable for the accounting portion so long as they were incurred for the common benefit. The parties were tenants in common, each owning an undivided half interest in real property. (*Id.* at p. 550.) The property was subject to a deed of trust in favor of a bank. The complaint requested partition and an accounting of all income received by defendant as rent for the property. (*Id.* at p. 551.) The appellate court held the parties must each pay a portion of the attorney fees expended for the common benefit pursuant to the partition statute (formally section 796). It recognized there was no provision allowing for attorney fees in an action seeking only an accounting. (*Id.* at p. 551.) It reasoned, "The primary purpose of this suit is partition of the realty. The accounting feature is incidental. The court had jurisdiction to allow attorney[] fees insofar as the services pertained to the partition and were for the common benefit. [Citation.] 'The presence and litigation of controversial

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[2] Because Villicana agrees a trial court is authorized to apportion attorney fees incurred in an accounting incidental to the partition lawsuit, we need not point out why it is legally incorrect to also assert a court is not authorized to apportion fees incurred for anything other than proceedings to perfect title, set boundaries, or make a property survey. Although those three types of action are listed in section 874.020, there is ample case and statutory authority (cited and referred to by Villicana) holding the list is not exclusive.

issues between all the parties does not preclude the allowance of attorney[] fees for services connected with such issues where such services are found to be for the common benefit of the parties.' [Citation.]" (*Ibid.*) The court noted the bank was not entitled to attorney fees under the partition statute because it was not a party to the action and there was no evidence legal services performed for the bank were for the common benefit of the parties to the suit. (*Id.* at p. 554.)

In addition to the *Regalado* case, Villicana discusses *Randell v. Randell* (1935) 4 Cal.2d 575, 582 (*Randell*). In that case, our Supreme Court reaffirmed the rule that attorney fees were permitted by statute for services rendered in a contested partition suit. In that case, appellant challenged the attorney fee award on the grounds the court did not specify what services were for the common benefit and which were "controversial issues connected with the accounting and the allowance for water stock." (*Ibid.*) The court determined it was enough that the final judgment stated the award represented "sums were incurred and expended by the plaintiffs for the common benefit of the parties hereto" and defendant failed to present argument or evidence on this issue at trial. (*Ibid.*) Rather, defendant "expressed himself as being satisfied to leave that matter to the discretion of the trial court." (*Ibid.*)

The Supreme Court determined, "The presence and litigation of controversial issues between all the parties does not preclude the allowance of attorney[] fees for services *connected with such issues where such services are found to be for the common benefit of the parties.* [Citation.] In the absence of evidence on the question we cannot say the trial court abused its discretion in allowing [attorney fees] for such services as were rendered by the plaintiffs' attorney for the common benefit of both parties in the division of the common property." (*Randell, supra,* 4 Cal.2d at p. 582, italics added.) Indeed, later courts have noted a finding of common benefit is particularly appropriate when the dispute concerns only two parties. (See *Riley v. Turpin* (1960) 53 Cal.2d 598, 603.)

Villicana maintains the above cases are factually distinguishable because in *Randell* the controversial issues involved water rights that would impact the value of the real estate in dispute, and in *Regalado* the accounting action was clearly incidental to the partition lawsuit. He adds that in *Regalado* case "the accounting was necessary to partition the realty." Villicana concludes that in his case, litigation of the declaratory relief action was not "necessary" to complete the partition claim. He characterizes the declaratory relief issues as concerning damages not for the common benefit of the parties. He argues his case is like *Anger v. Borden* (1951) 38 Cal.2d 136 (*Anger*).

In the *Anger* case, plaintiff brought an action for partition and to quiet title against several defendants. (*Anger, supra,* 38 Cal.2d at p. 137.) In addition to ruling plaintiff and the City of Pasadena were tenants in common, the court quieted all claims and demands of other defendants. (*Id.* at p. 138.) It also made several rulings concerning the enforcement of liens held for and against plaintiff. It denied attorney fees incurred "insofar as the quiet title aspect of the action was concerned." (*Ibid.*) The Supreme Court affirmed the ruling relying on former section 798, which expressly provided "that if 'other actions or proceedings have been necessarily prosecuted or defended . . . for the protection, confirmation, or perfecting of the title . . . the court shall allow to the parties to the action . . . all the expenses necessarily incurred therein, *except counsel fees,* which shall have accrued to the common benefit'. (Italics added.)" (*Id.* at p. 145.)

Villicana fails to appreciate that in 1976 section 798 was repealed and the first portion relating to expenses for the common benefit was continued in section 874.020. The portion of former 798 that excluded counsel fees was not included in the new statutory provision. Indeed, the current statute provides, "The costs of partition include reasonable expenses, *including attorney's fees*, necessarily incurred by a party for the common benefit in prosecuting or defending other actions or other proceedings for the protection, confirmation, or perfection of title, setting the boundaries, or making a

survey of the property, with interest thereon at the legal rate from the time of making the expenditures." (§ 874.020, italics added.)

Moreover, the *Anger* case is factually distinguishable because the trial did not resolve a quiet title claim. Villicana concedes the quiet title issue was resolved long before trial when the property was sold and the proceeds disbursed. Villicana agrees the "remaining issue" for trial related to loan proceeds, rents and lost property (the declaratory relief claim). The case before us thus is not analogous to *Anger*.

Villicana also cites *Muller v. Martin* (1953) 116 Cal.App.2d 431, to support his theory attorney fees were not recoverable. In that case, the court determined a party who acted as his own counsel in a partition action was not entitled to recover attorney fees. (*Id.* at p. 436.) The court rejected plaintiff's claim defendant's counsel performed no services for the "common benefit" as used in former section 796. It reasoned, "[P]laintiff overlooks the fact that it was defendant . . . who pleaded and proved the tenancy in common and sought a partition of the property. In effect, therefore, the defendant was in the same relative position as that normally occupied by the plaintiff in a partition suit. Many of the services rendered by the attorney for such a party (the moving party) in a partition suit inure to the benefit of all of the cotenants and, therefore, are for the 'common benefit.'" (*Ibid.*) Finally, the court noted plaintiff could not recover fees because (1) he did not stand in the position of plaintiff in the partition suit, (2) after appointment of the referee plaintiff did not perform legal services that could be characterized as for the common benefit, and (3) there was no evidence he expended any money for his own services in the action. (*Id.* at pp. 436-437.) We fail to understand how this case assists Villicana. Here, Lindsay was represented by counsel who performed legal services for the common benefit after the court denied her request to appoint a referee. The *Muller* opinion simply applies the statutory provision that authorizes apportionment of fees expended by either plaintiff or defendant, as long as those fees were incurred for the common benefit of all the parties.

As was the case in the *Randell* and *Regalado* opinions, the fees/costs in this case were incurred to adjudicate issues incidental to the petition claim. The record plainly shows Villicana's complaint alleged three causes of action (claims for partition, quiet title, and declaratory relief), and all the allegations essentially requested the same relief, i.e., an equitable division of property-related profits and expenses. Specifically, Villicana desired (1) confirmation he owned 50 percent of the Lowell Property (quiet title action and declaratory relief claim); (2) forced sale of the Lowell Property with equal division of the proceeds (partition claim); and (3) and a final adjudication of how much money each co-owner was owed for "loans, taxes, improvements, etc. on the subject real property" (declaratory relief claim). With respect to this last claim, although Villicana sought the payment of money as "damages" the allegations in the cause of action requested an equitable disbursement of property-related assets and proceeds as part of the partition, i.e., an accounting. As a general rule, it is the substance of the cause of action that is important rather than its form. Resolution of the partition claim and an equitable allocation of rents, loan proceeds, and improvements would be for the common benefit of the co-owners.

There is additional support for the conclusion that the trial in this case concerned a petition-related accounting. Villicana's trial brief, submitted before the hearing, outlined the three issues to still be decided by the trial court. Villicana stated the Lowell Property was sold, the proceeds distributed, but there were several "remaining issues" to the partition. He explained the court must decide whether he was (1) "entitled to a portion" of the money the co-owners refinanced from the Lowell Property, (2) eligible for "reimbursement to access rents and storage fees," or (3) authorized to collect from the co-owner the value of his personal items lost when she "asserted exclusive ownership" over the property. These items all refer to property-related assets, profits, and contributions.

"Every partition action includes a final accounting according to the principles of equity for both charges and credits upon each cotenant's interest. Credits include expenditures in excess of the cotenant's fractional share for necessary repairs, improvements that enhance the value of the property, taxes, payments of principal and interest on mortgages, and other liens, insurance for the common benefit, and protection and preservation of title. [Citation.]" (*Wallace, supra,* 220 Cal.App.3d at pp. 1035-1036.) We conclude, the "remaining issues" in this case involved the resolution of issues typically included in a final accounting incident to a partition.

As stated earlier in this opinion, the trial judge was in the best position to determine if the attorney fees were for services connected to the partition action and were for the common benefit of the parties. The "remaining issues" in this case concerned the equitable apportionment of loan sums depleting the property's equity and improvements that affected its fair market value. It cannot be said the court abused its discretion in determining that resolution of these issues were related to the partition claim and were for the common benefit of the owners.

Villicana suggests the common benefit should only include "services that were effective and productive." Specifically, he believes attorney fees related to Lindsay's failed attempt to appoint a referee should not be apportioned between the parties. He asserts the effort was a waste of money. However, that is not the standard. Not surprisingly he cannot produce any legal authority to support his argument. Lindsay's limited success in moving for summary judgment and a referee does not necessarily mean the attorney fees incurred were not for the common benefit. As stated earlier, services are rendered for the common benefit even in contested partition actions. (*Randell, supra,* 4 Cal.2d at p. 582.) The purpose of the motion was to spur Villicana into action and sell the property while the real estate market was lucrative. Lindsay wished to limit unnecessary litigation and expenses by unnecessarily prolonging the

action. She took steps to guarantee proper distribution of the common assets. These are all goals that served the common benefit.

Alternatively, Villicana makes the absurd assertion the trial had nothing to do with the partition action, but was solely motivated by his desire to pressure Lindsay to enter a global settlement and release her claims to property in Baja. This contention is belied by the record.

The following facts are undisputed: The only property interest mentioned in the underlying complaint is the Lowell Property. Villicana's partition action regarding the Lowell Property followed immediately after Lindsay's successful partition action of the Duncannon Property. Neither action concerned division of the Baja property.

In Villicana's partition action, Lindsay filed a motion for interlocutory judgment and appointment of referee to sell and apportion only the Lowell Property. The Baja property was not mentioned.

After the Lowell house was sold, Lindsay asked Villicana to dismiss the partition action and sign a stipulation for judgment regarding only the Lowell Property. Villicana refused to sign the stipulation for judgment regarding the Lowell Property unless Lindsay also agreed to release all her claims regarding the Baja property. Lindsay's counsel told Villicana that "ship had already sailed" in mid-2013 when the parties failed to reach an agreement regarding their three property disputes (to the Duncannon Property, the Lowell Property, and Baja Property).

When Lindsay refused to sign a global agreement, Villicana stated he would insist on a trial to resolve the remaining issues in the Lowell Property partition lawsuit, i.e., how the proceeds from the parties' line of credit should be distributed and apportionment of attorney fees permitted by the partition statute. (§ 874.040.) In his trial brief, Villicana discussed only these partition-related issues. There was no mention of the Baja property. The court's judgment awarded Villicana a portion of the Lowell Property's loan proceeds and gave to Lindsay fees/costs incurred "for the common

benefit." We found no evidence in the record to support Villicana's contention on appeal that the trial "had nothing to do with" the partition of the Lowell Property and was intending to resolve a dispute on the Baja property.

Villicana points out that before trial Lindsay made a settlement offer that discussed both the Lowell and Baja properties. Contrary to his contention on appeal, the settlement offer (which was rejected) does not prove the sole impetus for trial was to resolve the Baja property dispute. First, the settlement offer letter clearly distinguishes between the two disputes. It stated Lindsay was confident she would prevail at trial on the remaining issues of apportionment of the line of credit and attorney fees related to the Lowell Property. "If we go through trial, I am quite confident [Villicana] will again owe [Lindsay] a substantial amount of attorney fees." Lindsay's counsel offered the following terms of settlement "given the amount in controversy": (1) the parties would agree to enter judgment in the partition action regarding the Lowell Property under the same terms set forth in the stipulation of judgment proposed when the house was sold; (2) the parties would enter a "separate agreement" in which Villicana would agree to pay Lindsay 33.33 percent of the net proceeds following the sale of the Baja property and other terms resolving the Baja property dispute; and (3) each party would agree to a global release of all claims against the other party. The offer to settle expired and was withdrawn before trial started. Certainly this offer represented a compromise because Lindsay believed her personal funds paid for the couple's 50 percent interest in the property and she would be entitled to more than 33.33 percent. And she knew Villicana was under the impression he owned the entire 50 percent share of the Baja property. She hoped Villicana understood that because he was potentially on the hook for a large sum of attorney fees in the partition action he would consider avoiding the expense of another lawsuit regarding the parties respective rights to the Baja Property.

Second, there is no logical reason to infer Lindsay's offer to settle her claim to the Baja Property in addition to settling the Lowell Property partition action meant *the*

trial court was adjudicating both disputes. A settlement offer would have no bearing on the issues appropriately considered and decided by the trial court. In other words, one party's desire to use the pending litigation to pressure the other into a global settlement of additional disputes unrelated to the lawsuit does not transform the nature of the underlying partition action.

Finally, Villicana asserts the trial must have involved more than a partition action because Lindsay filed a motion for leave to file a cross-complaint. He does not explain why or discuss the nature of the cross-complaint. We note the motion is not contained in the appellant's appendix. The only reference we found to it was in Lindsay's counsel's declaration in support of her motion for attorney fees. He stated that after Villicana demanded a global settlement and refused to dismiss the partition action, Lindsay filed an ex parte application for an order shortening time to file a cross-complaint or to continue trial. He noted the court denied the motion because "it was so close to trial." Lindsay's counsel explained the motivation for filing the motion was Villicana's insistence on having a "full-blown evidentiary trial" on apportionment of the Lowell Property's loan proceeds and attorney fees. He stated it made "sense" for the parties to have the court determine other controversies if there was going to be a trial. He also explained none of the attorney fees incurred in filing the motion were included in Lindsay's motion for attorney fees for services relating to the petition action. We conclude this evidence certainly does not support Villicana's theory. To the contrary, it suggests the trial was limited to resolving claims incident to the partition action, and Lindsay's attempt to insert an additional dispute via her cross-complaint failed. The court denied the motion. Moreover, the trial court's minute order awarding fees contained the following clarification: "The [c]ourt notes fees and costs incurred as a result of [Lindsay's] arguments relating to the Baja property were not considered in the final award." The court recognized Lindsay's attempt to insert these arguments into her

untimely cross-complaint and fees relating to this unsuccessful endeavor were not recoverable.[3]

III

Villicana also contends he is entitled to a credit for at least some portion of his own attorney fees, which were set forth in an exhibit submitted by his attorney in opposition to Lindsay's motion. In its minute order, the trial court explained Villicana waived his right to seek apportionment of his fees by failing to timely file a motion.

On appeal, Villicana asserts the court's ruling was erroneous because when Lindsay filed her motion "she opened the door for [Villicana] to allocate his costs through opposition to her motion to allocate." He concludes a separate motion "was not a requisite" when a motion was filed by the other party. He offers no direct legal authority to support this argument. He simply notes Lindsay would not be prejudiced by his failure to file a separate motion because his attorney fees were comparable to hers. He believes a separate motion was unnecessary "because the very idea of the motion to allocate" is an "equitable concept" pursuant to section 874.040. He suggests equity demands the consideration of the fees paid by both parties and not just one.

Putting aside Villicana's failure to file a motion for attorney fees, his opposition did not request an allocation of attorney fees for services for the common benefit. Rather, in the opposition, Villicana stated he incurred $20,221.40 in attorney fees and costs starting May 15, 2015, to defend himself in the Baja dispute. He explains "it is due to [Lindsay's] imposition of the Baja real property which was *the sole cause* of

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[3] This also answers Villicana's argument costs associated with the Baja property should be omitted. The court expressly stated no fees or costs related to the Baja property were awarded. Moreover, the record citation supplied by Villicana to support this claim does not show Lindsay's attorney incurred $4,375 due to the Baja dispute. The sum represented services related to preparing the statement for the mandatory settlement conference, reviewing documents supporting the kitchen remodel, and preparing discovery requests.

[Villicana] to retain[] The Chang Firm" before trial on June 29, 2015." (Italics added.) This could be reasonably viewed as a concession his attorney fees were for services not related to the common benefit but to litigate a different matter. Moreover, Villicana argues Lindsay was responsible for 100 percent of these attorney fees, not an equitable apportionment as one would expect in a section 874.010 motion for attorney fees. In short, nothing about this attorney fee request appears to be related to the partition action.

As has been discussed, any litigation of the Baja property dispute was unrelated to the partition action and, therefore, would not be for the common benefit. Lindsay removed from her attorney fee request any bills relating to the preparation of her motion to file a cross-complaint raising issues concerning the Baja Property. Villicana's exhibit containing his counsel's billing sheets contain only general descriptions of legal services but do not indicate if any of those services were related to partition action or were otherwise for the parties' common benefit. Given his assertion the sole cause of the fees related to the Baja property, we conclude the court did not err in refusing to consider or apportion those fees between the parties.

IV

The judgment is affirmed. Respondent shall recover her costs on appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

IKOLA, J.